

NELSON C. BARRY

IBLA 81-838

Decided August 31, 1981

Appeal from decision of California State Office, Bureau of Land Management, declaring unpatented mining claims and millsite abandoned and void. CA MC 51073 through CA MC 51078.

Affirmed in part; reversed and remanded in part.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Millsites

The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976), to file an annual notice of intention to hold the millsite, is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: Nelson C. Barry, Esq., pro se.

## OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Nelson C. Barry appeals the June 8, 1981, decision of the California State Office, Bureau of Land Management (BLM), which declared the unpatented Indian Girl, Indian Girl #1, #2, #3, and #4 lode mining claims and Indian Girl #3 millsite, CA MC 51073 through CA MC 51078, abandoned and void because no evidence of assessment work or notice of intention to hold the claims for the calendar year 1980 had been filed with BLM on or before December 30, 1980, as required by 43 CFR 3833.2-1. 1/

Appellant argues that the action of BLM declaring the mining claims abandoned and void is an unconstitutional taking of property without due process of law. He asserts there was no intent to abandon and submits a copy of a proof of labor which was performed in May and June, 1980, as recorded in the records of Tuolumne County, California, March 31, 1981. He alleges that oversight was the cause for the delay in recording the proof of labor in Tuolumne County with BLM. He states that a proof of labor has been recorded in Tuolumne County each year since the location of the claims in 1930 and that, in addition, the annual taxes levied by the county have been paid.

[1] Section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1976), requires that the owner of an unpatented mining claim shall file, prior to December 31 of each calendar year, for record in the office where the location notice of the claim is recorded a notice of intention to hold the mining claim or an affidavit of assessment work performed for the unpatented mining claim, and prior to December 31 of each year shall file in the proper office of BLM a copy of the official record of the instrument recorded with the county. Section 314(c), 43 U.S.C. § 1744(c) (1976), states that failure to file the instruments as required shall be deemed conclusively to constitute abandonment of the unpatented mining claim by the owner.

It is to be noted that FLPMA requires only the filing of the affidavit of assessment work or notice of intention to hold for unpatented mining claims with BLM. The regulations add the requirement for a notice of intention to hold for unpatented millsites.

[2] Failure of the owner of an unpatented millsite to comply with requirements set forth only in the regulations and not statutory requirements is a curable defect. A person who fails to file information required only by the regulations is to be given notice of the defect and 30 days to comply. If compliance is not made within the allowed time, the millsite claim may be declared abandoned and void, in an appealable decision. Mrs. Otis Teaford, 56 IBLA 367 (1981); Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); see Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981).

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1/ Although Indian Girl #3 lode mining claim was omitted from the BLM decision by name, it was included by reference to CA MC 51076 (included as part of CA MC 51073 through CA MC 51078) at the heading of the decision.

The question of constitutionality of a statute should be raised in a forum different from this Board of Land Appeals, whose jurisdiction is strictly limited to that delegated by the Secretary of the Interior, an arm of the Executive Branch of the Federal Government. Decisions on constitutionality reside with the Judicial Branch of the Government.

We point out, however, that in Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981), the court ruled that the FLPMA requirements for filing of unpatented mining claims are not arbitrary or unreasonable and do not violate the Fifth Amendment to the United States Constitution. In Topaz Beryllium, *supra*, the Tenth Circuit Court held that the regulations promulgated under FLPMA, which provided that an unpatented mining claim could be deemed abandoned and void if the filings required by the Act were not made, were not in excess of statutory jurisdiction, authority, or limitations, or short of the statutory right under the Act.

In the facts of this case, where the owner of unpatented mining claims did not file, before December 31, 1980, a notice of intention to hold, or an affidavit of assessment work performed on the claims, and likewise did not file a copy of the official record of the instrument in the proper office of BLM before December 31, 1980, the mining claims are properly declared abandoned and void pursuant to FLPMA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed insofar as it relates to the unpatented lode mining claims, and vacated insofar as it relates to the unpatented millsite claim. The case is remanded for further action consistent with this opinion.

Douglas E. Henriques  
Administrative Judge

We concur:

Bernard V. Parrette  
Chief Administrative Judge

James L. Burski  
Administrative Judge

